Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

Pearl Moody,

Petitioner,

v.

United States Secretary of the Army,

Respondent

On Petition of Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What is the appropriate framework to establish a prima facie case of disparate treatment in an Age Discrimination in Employment Act claim?

2. Is there an exhaustion requirement when a claimant seeking a remedy under the Age Discrimination in Employment Act seeks an administrative remedy?

PARTIES TO THE PROCEEDING

1. Pearl Moody, petitioner
2. Acting United States Secretary of the Army, Les Brownlee, respondent
3. United States Department of Justice

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OPINIONS BELOW

DISTRICT COURT
United States District Court
for the Western District of Louisiana
Pearl Moody v. Thomas E. White, Secretary of the Army
No. 2:01 CV 0111

APPELLATE COURT
Pearl Moody v. United States Secretary of the Army
No. 02-31208 (5th Cir. August 21, 2003)

STATEMENT OF JURISDICTION

The decision and opinion of the United States Court of Appeals for the Fifth Circuit was issued and filed on August 21, 2003. This Petition for Writ of Certiorari is filed within 90 days after the filing of that opinion and decision. The United States Supreme Court's jurisdiction is invoked pursuant to 28 United States Code § 1254(1) providing in pertinent part that,

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

STATUTES INVOLVED

29 U.S.C. §§ 621.....4, 6

29 U.S.C. § 623.....7

29 U.S.C. § 633.....15

See Appendix For Text of Statutes Involved

STATEMENT OF THE CASE

While working for the United States Army under the supervision of Ellis Smith at Fort Polk, Louisiana, and then age 61, the petitioner, Pearl Moody, was subjected to age discrimination resulting in a failure to promote her despite her qualifications. These qualifications were apparent as Ms. Moody accomplished higher level tasks, all the time requesting a promotion. TR. 171-174. The Army also subjected Ms. Moody to a hostile work environment, as she had to regularly endure Mr. Smith's offensive statements such as "granny, have you not got anything to do," "see that old woman and she will take care of you," and "old woman, when are you going to retire and go home so someone younger can have a job." TR. 177. Mr. Smith's continued harassment, which caused an offensive work environment and included a deceptive scheme to deny Ms. Moody deserved promotions, is in direct violation of the Age Discrimination in Employment Act (ADEA); 29 U.S.C. §§ 621-633.

The District Court, Western District of Louisiana, initially denied the respondent's motion for summary judgment. However, on September 18, 2002, the District Court granted that motion based on the opinion that Pearl Moody failed to exhaust her administrative remedy. A motion to amend the judgment was filed on October 2, 2002 and a memorandum ruling denying the motion to amend the judgment was entered on November 14, 2002. Pearl Moody filed notice of appeal on November 25, 2002. The Court of Appeals for the United States Fifth Circuit, on August 21, 2003, affirmed the district court's grant of summary judgment in favor of the respondent based on the opinion that Ms. Moody failed to establish a prima facie case for age discrimination.

Pearl Moody has been a civilian employee of the Army for over 23 years. At the beginning of her employment in 1980, Ms. Moody was an hourly wage non-appropriated employee. In two years she went from a non-appropriated position to a Government Service (GS)-4 permanent position. In 1985 Ms. Moody was promoted to a GS-5 position. In 1987 she was assigned to the real estate department as a real property clerk, 303 series. The petitioner currently works in the same department as a real property technician in the 1101 series. At present, she is a GS-5, Step 10. Ms. Moody is at the ceiling of her classification because Step 10 is the highest level that a GS-5 may achieve. Despite the fact that Ms. Moody has never received any poor performance evaluations, the last time that the petitioner received a pay increase was several years ago when she acquired the Step 10 status. Thus, in order to obtain an increase in pay, Ms. Moody must be promoted.

Despite the fact that Pearl Moody is only a GS-5, she has been assigned and performed tasks equivalent to the duties of employees at the GS-9 through GS-12 levels. TR. 171-174. Such tasks include performing surveys, boundaries, encroachments, and estimates of new buildings. TR. 171-174. The aforementioned tasks were assigned to Ms. Moody by Ellis Smith, the supervisor who subjected Ms. Moody to the discriminatory acts. Over a period of years Mr. Smith not only referred to Ms. Moody as "granny" and "old woman," but has also made remarks encouraging her to "go home and garden," "bake cookies" and "go fishing." TR. 177. Moreover, Mr. Smith has told Ms. Moody to "retire so that someone younger may have a job." TR. 177. These comments came in the presence of other employees and people in the military who happened to be in the office at the time that the comments were made. TR. 171-174, 177, 178.

Despite such discriminatory treatment Pearl Moody repeatedly sought to be promoted. In February 1995, Mr. Smith allegedly encouraged Ms. Moody to apply for a position for which she was qualified. The position would place her in a GS-7 position with training to become a GS-9. However, Mr. Smith changed the job description during the application process which resulted in Ms. Moody being ineligible for the position. The changed position was given to a much younger employee. TR. 171-174.

Because of the ongoing ageist remarks made by her supervisor, and his failure to promote, Pearl Moody made numerous visits to the Fork Polk Equal Employment Opportunity Office. Her continued visits led to numerous counseling sessions with EEO counselor, Barbara Warren, and the eventual filing of a complaint. Ultimately there was a mediation session between petitioner and Mr. Smith with Jim Kelly, who at that time served as the acting director for the Department of Public Works. The result of the mediation session was a Negotiated Settlement Agreement (NSA). TR. 168-170. However, the Army failed to meet certain terms of the NSA, frustrating Ms. Moody who was forced to seek redress through the judicial system. The federal district court concluded that both parties breached the terms of the NSA rendering the NSA void. In any event, after the non-adherence of the NSA, Ms. Moody decided to contact the EEOC to report the lack of compliance. Shortly thereafter, Ms. Moody received her right to sue letter from the EEOC and commenced this civil action.

ARGUMENT

The purpose of the ADEA is, in part, to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment...." 29 U.S.C. § 621(b). In keeping with this

purpose employers may not discriminate against an employee because of his age in regard to "...compensation, terms, conditions, or privileges of employment...." 29 U.S.C. § 623(a)(1).

Unlike employment discrimination claims under Title VII, the ADEA allows a victim of age discrimination the option of either seeking relief through an administrative remedy or through the federal court system. Courts have relied on the *McDonnell Douglas* analysis for ADEA claims when disparate treatment is to be proved using circumstantial evidence. *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973). It is not clear, however, whether the *McDonnell Douglas* analysis is the appropriate framework. Moreover, if *McDonnell Douglas* is the appropriate framework, it is not clear what elements are necessary to establish a prima facie case when an employer has failed to promote and the individual is subjected to a hostile working environment. In addition, there is a lack of consistency within the federal court system as to whether the option of using either an administrative remedy, or seeking relief directly through the federal court system, means that one still must exhaust the administrative remedy since the employee has the choice of either seeking relief through federal court without seeking the administrative remedy as a prerequisite.

In Pearl Moody's case the Fifth Circuit affirmed the District Court's grant of summary judgment based on its opinion that Ms. Moody failed to demonstrate a prima facie case of age discrimination. The District Court dismissed Ms. Moody's claims for failure to exhaust administrative remedies. Thus, two issues are of concern in determining the grant of summary judgment by the lower courts. One is the failure to make out a prima facie case of age discrimination. The other is the failure to exhaust administrative remedies.

The discord among the circuits regarding what is necessary to make out a prima facie case in federal ADEA claims has yet to be settled by this Honorable Court. Moreover, there is a lack of clarity on whether there is a need to exhaust administrative remedies in age discrimination cases. Due to these significant discrepancies the petitioner respectfully entreats this court to grant this petition for Writ of Certiorari.

I. Appropriate framework to establish a prima facie case

According to *McDonnell Douglas*, supra, at 411 U.S. 802, in order to establish a prima facie case of disparate treatment in a Title VII claim, the complainant must prove: (1) that the plaintiff belongs to a protected class; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and the employer continued to seek applicants with similar qualifications. *McDonnell Douglas*, supra, at 411 U.S. 802. Although the United States Supreme Court has never stated that the *McDonnell Douglas* framework is the appropriate framework to be used in ADEA claims, it has been assumed to be appropriate. See, *O'Connor v. Consolidated Coin Caterers Corporation*, 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996).

Using the *McDonnell Douglas* framework the Tenth Circuit, in *Coe v. Yellow Freight System, Inc.*, 646 F.2d 444 (10th Cir. 1981), declared that, to establish a prima facie case of discrimination resulting in a failure to promote, the plaintiff must establish: "(1) he applied for an available position; (2) he was qualified for the position; and (3) he was rejected under circumstances which gave rise to an inference of unlawful discrimination...." *Coe*, supra, at 448-449. Pearl

Moody met each element necessary to establish a prima facie case by the Tenth Circuit standard. Ms. Moody's vast experience qualified her for the position of Engineer Tech 07 for which she applied. TR. 171-174. However, during the course of the application process the job description was changed by the same supervisor who admitted to making discriminatory age related comments toward and about Ms. Moody. TR. 171-174, 177. The facts presented in this case clearly give rise to an inference of unlawful discrimination. *Id. Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L. Ed. 2d 105 (2000).

In another decision the Tenth Circuit inferred that proof that one sought a position would be sufficient to establish a prima facie case. *Garcia v. Pueblo Country Club*, 299 F.3d 1233 (10th Cir. 2002). In particular, the appellate court wrote, "to establish a prima facie case for failure to promote, plaintiff must show...that *she applied for—or at least sought*—the position at issue." *Id.*, at 1238. There is a significant difference between applying for a position and seeking a position. According to *Webster's Third New International Dictionary,* "apply" in the context of employment means to make an appeal or a request formally and often in writing, whereas "seek" means to go in search of, to look for, or to try to discover. *Webster's Third New International Dictionary*, pgs. 105, 2055, Springfield, MA, Merriam-Webster, Inc., (1986). The *Black's Law Dictionary* defines "apply" in a similar manner, to make a formal request or motion. *Black's Law Dictionary* 101, pg. 96, (Bryan A. Garner ed., 7th ed., West 1999). Thus, in regard to Pearl Moody, even if she is found to have not applied for the position that was changed in February 1995, she definitely sought out positions to advance her employment status and would have established a prima facie case in the Tenth Circuit according to this opinion authored by Circuit Judge Henry. This discrepancy should be addressed.

Not only is there a difference in what must be proven to establish a prima facie case of age discrimination, there are also differences among the circuits as to how strict the courts will be in proving the elements of a prima facie case. The Third Circuit in *Torre v. Casio, Inc.*, 42 F.3d 825 (3d Cir. 1994), determined that the prima facie elements are flexible. In *Torre*, an employer over the age of forty was transferred, then terminated, during a reduction in force. The court of appeals held that, even without evidence of a replacement, a prima facie case was nonetheless established. The Third Circuit, via Circuit Judge Lewis, wrote, "the nature of the required showing to establish a prima facie case of disparate treatment...depends on the circumstances of the case." *Torre*, supra, at 831, citing *Massarsky v. General Motors Corp.*, 706 F.2d 111, 118. The court of appeals reasoned that "while we noted in [*Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1078 (3d Cir. 1992)] that an ADEA plaintiff *may* establish [her] prima facie case by meeting the four criteria announced there, we did not conclude that those elements were inflexible." *Torre*, supra, at 831. The court concluded that it was appropriate to reformulate the fourth element due to the circumstances of that case. The court of appeals in *Torre* noted that "the inference of age discrimination may not be overpowering, but we cannot say that, as a matter of law, it is insufficient." *Torre*, supra at 832.

The Sixth Circuit also has adjusted the elements necessary to establish a prima facie case under the *McDonnell Douglas* framework. In *Sunstrom v. Schering-Plough Corporation*, 856 F.Supp. 1265 (E.D. Tenn. 1994), a sales representative brought an ADEA action against her employer. The District Court for the Eastern District of Tennessee dismissed plaintiff's claim, holding in part that there was not enough proof to support her ADEA claim. The court through Chief Judge Jarvis noted, "the United States

Court of Appeals for the Sixth Circuit has rejected strict adherence to the *McDonnell Douglas* criteria and has noted problems associated with the mechanistic application of it: A mechanical application of the *McDonnell Douglas* guidelines might bar the suit of a worthy ADEA claimant." *Sunstrom*, supra at 1271. Consequently, if Pearl Moody had brought her claim in the Sixth Circuit, it seems likely that she would have realized her day in court.

The First Circuit also uses the *McDonnell Douglas* analysis in ADEA claims. The elements necessary to establish an ADEA prima facie case are: (1) the plaintiff must be in a protected class; (2) the plaintiff must meet the employer's legitimate performance expectations; (3) the plaintiff must be adversely affected; and (4) the plaintiff was replaced by another with similar skills and qualifications. *Mulero-Rodriguez v. Ponte, Inc.*, 98 F.3d 670, 673 (1st Cir. 1996). At age 61 Pearl Moody was in the protected class. Ms. Moody met the Army's legitimate performance expectations as evidenced by her absence of poor performance evaluations. Ms. Moody was adversely affected as she was unable to receive promotions and was subjected to the constant discrimination and discriminatory remarks to which her supervisor admitted. TR. 177. As for the fourth category, Ms. Moody was not replaced by anyone. However, this element seems unnecessary according to Justice Scalia in his opinion in *O'Connor*. *O'Connor*, supra, at 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433, (1996). In *O'Connor,* an employee was discharged after reorganization and brought an ADEA action against his former employer. The Fourth Circuit upheld the dismissal of plaintiff's claims for lack of establishing a prima facie case. That Court held that the plaintiff failed to show that he was replaced by someone outside the protected class. Justice Scalia wrote, "because it lacks probative value, the fact that an ADEA plaintiff was replaced by someone outside the

protected class is not a proper element of the *McDonnell Douglas* prima facie case." *O'Connor*, supra, at 317 U.S. 312.

The U. S. District Court for the Southern District of Ohio, in *Noble v. Brinker International, Inc.*, 175 F. Supp. 2d 1027 (S. D. Ohio 2001), grappled with the issue of what elements are necessary to establish a prima facie case. This district court did not use a stringent method to determine if a prima facie case had been established and ultimately declared that the plaintiff established a prima facie case. The fourth prong was passed based on the plaintiff's declaration that a co-worker, not in the protected class, was treated better than he was.

The fourth element in *Noble* appears to be irrelevant based on Justice Scalia's reasoning in. *O'Connor*, supra, at 317 U.S. 312. It is noteworthy that *O'Connor* was decided prior to *Noble*. Clearly it is time for this Honorable Court to expressly identify the elements necessary for a prima facie case of age discrimination.

The Seventh Circuit, in *Volovsek v. Wisconsin Department of Agriculture, Trade and Consumer Protection*, 344 F. 3d 680 (7th Cir. 2003), wrote through Circuit Judge Cudahy that the elements necessary to establish a prima facie case are: (1) she is a member of a protected class; (2) she met the employer's legitimate work expectations; (3) the employer took adverse employment action; and (4) the employer treated similarly situated employees outside the protected class more favorably. Again, the fourth element appears to be irrelevant as it changes from circuit to circuit. Even so, Pearl Moody established a prima facie case in the Seventh Circuit as her age clearly placed her within the protected class, she had an exceptional employment record, and she was denied promotions and subjected to constant

discriminatory acts by her supervisor. TR. 171-174, 177. As for the fourth element Pearl Moody has no problem establishing it, based primarily on her treatment by her supervisor and his constant denials of promotions. TR. 171-174, 177. Thus, Ms. Moody establishes her prima facie case according to the Seventh Circuit.

In Pearl Moody's case the Fifth Circuit has used a too restrictive version of the *McDonnell Douglas* framework. The various circuits have altered the *McDonnell Douglas* framework in order to fit what is thought to be appropriate in its particular circuit. Some circuits are more flexible than others and consider the circumstances of the individual cases to determine if a plaintiff has proven her prima facie case. The effect is a split within the circuits. The United States Supreme Court should settle the matter and provide clarity on what makes up the prima facie elements in a claim under the federal ADEA.

Justice Scalia has recognized that the Supreme Court has never actually decided if the *McDonnell Douglas* framework is the appropriate framework to be used in ADEA cases. In *O'Connor*, Justice Scalia, in addressing the proper prima facie elements to apply in an ADEA claim, stated, "we have never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct...." *O'Connor*, supra, at 1310. The court abandoned the issue because the parties did not contest the point. It is now appropriate for this Court to address the issue.

II. Exhaustion requirement

The Fifth Circuit, in upholding the District Court's granting of respondent's motion for summary judgment, did not address the issue of whether Pearl Moody exhausted her

administrative remedies. It opined that Ms. Moody failed to make out a prima facie case. However, because the district court granted summary judgment for an alleged failure to exhaust administrative remedies and, due to the split in the circuits on this point, the petitioner is seeking clarity on this issue.

In *Bankston v. White*, 345 F.3d 768, 777 (9th Cir. 2003), the Ninth Circuit in a per curiam opinion held "the ADEA itself does not require Bankston to exhaust administrative remedies before filing suit...."

In *Stevens v. Department of the Treasury, et al.*, 500 U.S. 1, 6 111 S.Ct. 1562, 114 L. Ed. 2d 1 (1991), Justice Blackmun delivered the opinion for the majority, "a federal employee complaining of age discrimination, however, does not have to seek relief from his employing agency or the EEOC at all." Justice Blackmun recognized that, "...the exhaustion issue has divided the Circuits" and compared *Langford v. United States Army Corps of Engineers*, 839 F.2d 1192 (6th Cir. 1988), with *Purtill v. Harris*, 658 F. 2d 134 (3d Cir. 1981), cert. denied, 462 U.W. 1131, 103 S.Ct. 3110, 77 L.Ed.2d 1365 (1983). However, because of a procedural difficulty, the Supreme Court declined to rule on the merits of the exhaustion issue. Justice Stevens, in his opinion concurring in part and dissenting in part, would have decided the issue and wrote, "in my view, the Government is quite right in its present position that the statute contains no requirement that a federal employee exhaust administrative remedies before instituting a court action." The issue has resurfaced in Pearl Moody's case as the Fifth Circuit, in imparting an exhaustion requirement, goes counter to Justice Stevens' opinion.

The federal district court in *Rann v. Chao*, 2003 WL 22331896 (D.C. Cir. 2003) wrote that the District of

Columbia Circuit has held that the "timeliness and exhaustion requirements of § 633a(d) are subject to equitable defenses...." *Rann,* supra, at 2. Moreover, the district court asserted that "the ADEA is silent on whether a plaintiff who has started the administrative process by filing such a complaint must reasonably pursue the process, as an exhaustion requirement would ordinarily entail." The circuits are split on this point. Compare *Langford v. United States Army Corps of Engineers*, 839 F.2d 1192 (6th Cir. 1988) (finding no exhaustion necessary) and *Bak v. Postal Service*, 52 F.3d 241 at 243-244 (9th Cir. 1995) (finding no exhaustion necessary), with *Purtill v. Harris*, 658 F. 2d 134 at 138 (3d Cir. 1981) (finding need for exhaustion). The District of Columbia Circuit abstained from addressing the exhaustion issue based on the fact that the parties stipulated that there was an exhaustion requirement.

Consequently, due to the split among the circuits regarding the exhaustion requirements of an ADEA claim, the United States Supreme Court should grant this petition of writ of certiorari.

CONCLUSION

There are two issues of great import that should be addressed by the United States Supreme Court. Although the Fifth Circuit affirmed the federal district court's opinion to grant summary judgment in favor of the respondent, that decision was based on a failure to establish a prima facie case. The *McDonnell Douglas* structure has never been established by this Court as the appropriate structure to use in an ADEA claim. The various federal circuits are divided on this issue, in some cases reformulating the *McDonnell Douglas* framework. Moreover, some circuits have pursued a more flexible approach to the requirements to establish a

prima facie case. Because of the importance of the issue and the obvious confusion thereof, this Court should grant this writ in order to settle the matter.

The circuits are likewise split on whether there is an exhaustion requirement for ADEA claims. Because the ADEA does not explicitly state an exhaustion requirement, various circuits have imposed the necessity to exhaust administrative remedies while others have not. For the sake of consistency in the federal law this writ should be granted.

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UNITED STATES
COURT OF APPEALS
FIFTH CIRCUIT
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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 02-31208

PEARL MOODY

Plaintiff-
Appellant,

versus

UNITED STATES
SECRETARY OF THE ARMY, Defendant-
Appellee

Appeal from the United States District Court
For the Western District of Louisiana
(01-CV-111)

Before JOY, HIGGINBOTHAM, and STEWART, Circuit Judges.

PER CURIAM:*

Pearl Moody appeals the district court's grant of summary judgment, dismissing all of her claims. Moody alleged that her employer, the United States Army, discriminated against her because of her age, in violation of the Age Discrimination in Employment Act (ADEA),[1] as well as Louisiana's state age discrimination law.[2] We affirm on the basis that Moody has failed to demonstrate a prima facie case of age discrimination.

I.

Moody alleges that her supervisor, Ellis Smith, harassed her for several years based on her age, and refused to give her a promotion or reevaluate her job and upgrade her pay scale to reflect the work she was actually doing. Moody complained to the Equal Employment Opportunity Office, and eventually entered a settlement agreement to resole the dispute. However, after Moody concluded that the Army was failing to follow through on the settlement, she sued in district court. The Army moved to dismiss on the basis that

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

[1] 29 U.S.C. § 621, *et seq.*

[2] The district court dismissed Moody's state law claims and she has not appealed that decision here.

the dispute had been resolved by the settlement agreement, but the district court concluded that both parties breached the terms of the agreement and therefore it was void. Neither party appeals that decision. The Army then moved for summary judgment based on Moody's alleged failure to exhaust administrative remedies, or alternatively, failure to make out a prima facie case of age discrimination. The district court granted summary judgment in favor of the Army and dismissed Moody's claims with prejudice. The district court also granted the Army's motion to strike several exhibits from Moody's response, and denied Moody's Rule 59(e) Motion to Amend Judgment. Moody has not appealed either of these decisions. Moody timely appealed the grant of summary judgment.

We review a grant of summary judgment *de novo*, applying the same standard as the district court.[3] Summary Judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[4] An issue is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party.[5] Although the district court dismissed Moody's claims for failure to exhaust administrative remedies, the Army also urges that Moody failed to make out a prima facie case of discrimination. We turn to this alternative basis first.[6]

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[3] See *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 205 (5th Cir. 1998).

[4] See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986); *see also* Fed. R. Civ. P. 56(c).

[5] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[6] The timely filing requirements of the ADEA function as statutes of limitations rather than a prerequisite for jurisdiction. *See Rhodes v.*

A claim for violation of the ADEA may be established by direct or circumstantial evidence. If the plaintiff provides circumstantial evidence of discrimination, the familiar burden shifting framework of *McDonnell Douglas* applies.[1] Under *McDonnell Douglas*, the plaintiff must first establish a prima facie case of discrimination, which the defendant must then rebut by producing a legitimate, nondiscriminatory justification for its actions. The plaintiff must then demonstrate that the proffered reasons are pretextual, and establish that the defendant's actions were discriminatory.[2]

To establish a prima facie case of failure to promote base don age discrimination, the employee must demonstrate that "1) he belongs to the protected class, 2) he applied to and was qualified for a position for which applicants were being sought, 3) he was rejected, and 4) another applicant not belonging to the protected class was hired."[3] Here, Moody alleges that she asked for a promotion on numerous occasions, although she only cites a single occasion on February of 1995 when she applied for an open position. She claims that Smith changed the job description of the position for which she applied, and "[t]he effect of this change was to deny Moody the promotion." She also alleges that Smith gave the promotion to a much younger employee.

Guiberson Oil Tools Div., 927 F.2d 876, 878 (5th Cir. 1991); *Henderson v. Untied States Veterans Admin.*, 790 F.2d 436, 440 (5th Cir. 1986). Therefore, we need not decide the timeliness of Moody's claims before addressing their merits.

[1] *See Evans v. City of Houston*, 246 F.3d 344, 349 (5th Cir. 2001) (citing *McDonnell Douglas v. Green*, 411 U.S. 792 (1973)).

[2] *Id.* at 350.

[3] *Medina v. Ramsey Steel Co.*, 238 F.3d 674, 680-81 (5th Cir. 2001) (citing *McDonnell Douglas v. Green*, 411 U.S. 792 (1973)).

It is clear that Moody, who is 62 years-old, is a member of the protected class and that she was rejected for the promotion. However, the summary judgment evidence does not establish that Moody was qualified for the position for which she applied. Likewise, there is no summary judgment evidence before us which indicates that the position was given to someone who was not a member of the protected class.[4] Therefore, Moody has failed to establish a prima facie case based on a failure to promote.

Similarly, Moody has also failed to establish a prima facie case for any claim that she failed to receive a pay raise or a reevaluation of her pay scale to reflect the work she was actually performing. To establish such a claim, she must demonstrate that younger employees who were similarly situated received raises or reevaluation of their pay scales.[5] Although she claims that she is the lowest paid employee in her department, she has not presented any evidence that other *similarly situated* younger employees are paid more. The fact that she is the lowest paid employee, without more, cannot establish a prima facie case of discrimination.

Because Moody has failed to establish a prima facie case of discrimination under the *McDonnell Douglas* framework, she must establish discrimination by direct evidence.[6]

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[4] Moody refers only to a stricken exhibit which states that the position was given to "a friend" of Smith's. Even if we were to consider this stricken evidence, it does not establish that Moody was qualified for the position or that it was given to someone younger.

[5] *See Bennett v. Total Minatome Corp.*, 138 F.3d 1053, 1062 (5th Cir. 1998).

[6] *See Auguster v. Vermilion Parish Sch. Bd.*, 249 F.3d 400, 404 (5th Cir. 2001) (stating that where the plaintiff's claims cannot survive under the

Although Moody alleges that Smith engaged in a long-running pattern of harassment, her detailed log of Smith's behavior cites only four instances where Smith's behavior evidence discriminatory animus. In August, 1997, he asked Moody, "Granny have not got anything to do?;" on August 26, 1998, he directed someone to Moody by stating, "See that old woman and she will take care or you;" on August 31, 1998, he asked Moody, "old woman, when are you going to retire and go home so someone younger can have a job?"; and again on September 17, 1998, he asked, "Granny, when are you going to retire and let someone younger have a jog?"[7]

We analyze remarks presented as direct evidence of discrimination under the test articulated in *Brown v. CSC Logic, Inc.*[8] "For comments in the workplace to provide sufficient evidence of discrimination, they must be 1) related to the protected class of persons of which the plaintiff is a member; 2) proximate in time to the [employment decision]; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue."[9]

We begin by noting that all of the remarks occurred well after the denial of the promotion in 1995, and thus cannot be

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McDonnell Douglas framework, the plaintiff must prove discrimination by direct evidence.

[7] Moody also complains of other harassing behavior by Smith, and alleges that it was motivated by her age. Even assuming that this unsupported allegation is true, Smith's other behavior is not direct evidence of age discrimination.

[8] *See Laxton v. Gap, Inc.* 333 F.3d 572, 583 n. 4 (5th Cir. 2003); *Auguster*, 249 F.3d at 405.

[9] *Id.* (internal quotation marks and brackets omitted).

evidence of discriminatory motive in denying the promotion. They could, however, be evidence of discriminatory motive in failing to give Moody a raise, or to reevaluate her pay scale. Only the remarks made on August 31 and September 17 are arguably related to a failure to grant a pay raise, whereas the other two remarks merely evidence animus directed at Moody based on her age and thus are not direct evidence of discrimination. However, because Moody does not indicate when she asked for and was denied a pay raise, other than to state that she "repeatedly asked" for a promotion, we cannot evaluate whether these comments are proximate in time to any employment action. We therefore find that these two comments do not raise an issue of material fact sufficient to avoid summary judgment.

Finally, Moody alleges that the comments listed above constitute a hostile work environment. While these comments are offensive and boorish, they are not "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.[10]

III.

We therefore AFFIRM the district court's grant of summary judgment dismissing all of Moody's claims with prejudice.

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[10] *Shepard v. Comptroller of Pub. Accounts of the State of Tex.*, 168 F.3d 871, 874 (5th Cir. 1999) (internal quotation marks and brackets omitted).

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

PEARL MOODY **VERSUS** **THOMAS E. WHITE, SECRETARY OF THE ARMY**	**CIVIL ACTION NO. CV01-0111** **JUDGE TRIMBLE** **MAGISTRATE JUDGE WILSON**

MEMORANDUM RULING

Presently before the court is a Motion to Dismiss [doc.25] pursuant to Rule 12(b)(6) filed by the defendant. The plaintiff filed an opposition [doc.36] and the Army filed a reply.

Facts and Procedural History

The plaintiff, Pearl Moody ("Moody"), alleges that the Department of the Army discriminated against her on the basis of age when her former supervisor, Ellis Smith ("Smith") engaged in a pattern of harassing and discriminating remarks. The plaintiff also claims that the Department of the Army, specifically Ellis Smith, discriminated against her by refusing to promote her based upon her age.

On November 2, 1999, Moody filed an informal complaint with an Equal Opportunity Counselor, Barbara Warren ("Warren"), at the Equal Opportunity Programs office, Fort Polk, Louisiana. The informal complaint alleged

that Smith had called the plaintiff "granny", "old lady", and "old woman." The complaint also listed occasions when Smith allegedly harassed or made fun of the plaintiff. The informal complaint listed one occasion when the plaintiff was asked to do something that was part of someone else's job (August 27, 1998). In her informal complaint, Moody requested a formal apology from Ellis Smith and a promotion to GS-06.

On January 27, 2000, Moody informed Warren that she wanted to vacate counseling and mediate her complaint. On February 3, 2000, Warren conducted a final interview with the plaintiff and informed her of her right to file a formal complaint.

On April 25, 2000, Moody signed a mediation Checklist indicating a desire to mediate the case, outlining the issues for mediation and the relief sought.

On May 4, 2000, Moody participated in a mediation session with a representative from the Directorate of Public Works, Jim Kelley, The mediator was John Costa. The parties agreed to a settlement proposal during the mediation session and the appropriate government approvals for the settlement were obtained.

On July 11, 2000, all the parties finalized the Negotiated Settlement Agreement ("NSA"). In the NSA, the Army agreed to do the following:

1) Counsel Smith in the use of the chain of command. This session was to be completed within ten days from the July 11, 2000 date of the agreement.

2) Counsel Smith on professional and common courtesy. This session was to be completed within

ten days from the July 11, 2000 date of the agreement.

3) Provide Moody with a written and oral apology from Smith in regard to his behavior towards her The oral apology was to be made in the presence of the Director, DPW. This session was to be completed within ten days from the July 11, 2000 date of the agreement.

4) Submit Moody's job description to the Position Management Group ("PMG") within 30 days of the agreement. Within 5 days of the completion of the position description review, an audit from the PMG was to be requested.

5) Conduct specialized training on treatment and respect of others with DPW, ESPD personnel and with John Costa present at all sessions.

In the NSA, Moody agreed that:

1) Her signature on the NSA constitutes a full and complete settlement of this complaint;

2) She will withdraw the complaint and further waives the right to sue over the matters raised in this complaint and agrees that they will not be made the subject of future litigation; and

3) That the army will not pay the costs or attorneys fees associated with this complaint and settlement.

If the plaintiff believed that the Army filed to comply with the terms of the settlement agreement she was to notify the EEOCCRA, in writing, of the alleged noncompliance.

The Army admitted that they did not comply with the terms of the NSA until December 13, 2000, and that the training was not conducted until March of 2001.

The plaintiff argued that the tardiness was not the only noncompliance. The verbal apology was to be made in the presence of the director. The director at the time was Lt. Col. Mazion and he was not present. John Costa, the mediator, never attended the training classes as mandated by the NSA.

The Army argued that Moody never filed the required notice with the EEOCCRA. The copy of the letter that the plaintiff sent was attached to EXh. I of the Army's motion, but the plaintiff merely gave notice of her intent to sue. Moody states that the letter was never answered by the EEOCCRA, so she filed with the EEOC. Counsel for the plaintiff argues that the plaintiff is a lay person and should not be held to the same standards as an attorney when judging the content of the letter.

On November 29, 2000, the EEOC informed the Army of the Plaintiff's intent to sue and notified Moody of her right to file suit. The Army responded that it had complied with all the terms of the NSA on January 8, 2001[11] Moody filed this suit on February 9, 2001.

The Army previously moved for summary judgment on the grounds that the negotiated settlement agreement precluded Moody's claim, but this court denied that the motion holding that breaches by both parties voided the settlement agreement.

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[11] Even though the required training was not completed until March, 2001.

The Army is now moving to dismiss Moody's complaint arguing that the Court lacks subject matter jurisdiction. The Army argues that the United States has conditioned its waiver of sovereign immunity under the ADEA upon the plaintiff either filing an administrative claim within 45 days of the alleged discriminatory act or providing the EEOC with notice of intent to file suit within 180 days of the alleged act. The Army argues that sovereign immunity also requires the court to strike Moody's Louisiana state law claim, as well as her request for a jury trial, compensatory damages, general and special damages, and liquidated damages.

The Army also argues that Moody has failed to state a claim upon which relief can be granted. The Army asserts that the remarks about which Moody complains do not amount to an adverse personnel action and do not entitled her to relief under the ADEA. Additionally, the Army takes the position that Moody cannot establish a prima facie failure to promote case as she cannot show that she ever applied for or was qualified for a promotion or upgrade.

Law and Analysis

A. Jurisdictional Issues

"In analyzing whether Congress has waived the immunity of the United States, we must construe waivers strictly in favor of the sovereign and not enlarge the waiver beyond what the language requires." *Library of Congress v. Shaw*, 478 U.S. 310, 318, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986) (citations omitted) (internal quotation marks omitted); accord *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992). Thus, waiver cannot be implied; it must be unequivocally expressed.

United States v. Mitchell, 445 U.S. 535, 538, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980); *Dorsey v. U.S. Dep't of Labor*, 41 F.3d 1551, 1554-55 (D.C. Cir. 1994).

The court in *Forman v. Small*, 271 F.3d 285 (C..A.D.C., 2001), discussed federal sovereign immunity with the respect to ADEA claims:

> Congress expanded the scope of the ADEA in 1974 to include state and local governments and federal employers. See Pub.L. No. 93-259, 88 Stat. 74 (1974) (codified as amended at 29 U.S.C. §§ 630(b), 633(a). Unlike state and local governments, which were merely added to the definition of "employer" in the ADEA, Congress created an entirely new section of the ADEA in which it waived federal sovereign immunity. This section, codified as § 633a, provides that "[a]ll personnel actions affecting [federal agency] employees ... shall be made free from any discrimination based on age." 29 U.S.C. § 633 a(a). Thus, "Congress deliberately prescribed a distinct statutory scheme applicable only to the federal sector." *Lehman v. Nakshian*, 453 U.S. 156, 167 n. 15, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981).

> ...Congress used sweeping language when it subsequently extended the ADEA to cover federal agency employees. Congress required no less than that "[a]ll personnel actions affecting employees ... who are at least 40 years of age ... shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a) (emphasis added).

Forman v. Small, 271 F.3d 283, 296 (C..A.D.C., 2001).

The ADEA gives a federal employee alleging age discrimination two avenues to pursue relief. First, she can file an Equal Employment Opportunity (EEO) complaint with the employing agency. 29 U.S.C. § 633a(b). If seeking relief under the administrative process, the employee must consult an EEO Counselor within 45 days of the date of the alleged discriminatory matter. 29 C.F.R. § 1614.105(a)(1).

The second option available to a federal employee is a suit in federal court. 29 U.S.C. § 633a(c) and (d). If an employee seeks to bypass the administrative process and proceed in federal court, the employee must give notice of her intent to file a lawsuit to the Equal Employment Opportunity Commission (EEOC) within 180 days after the alleged unlawful practice occurred. She must then wait thirty days before filing suit, 29 U.S.C. § 633 a(d).

Federal employees must seek informal counseling before they file an EEOC complaint. 29 C.F.R. § 1614.105(a). If the employee fails to do so, his claim is barred. *Pacheco v. Rice*, 966 F.2d 904, 904 (5th Cir. 1992). The employee must

establish waiver, estoppel, or equitable tolling to circumvent this requirement. *Id.* Moody sought relief administratively.

Moody visited the EEO office in 1995 and 1997. She contacted the installation EEO office to file a formal complaint for the first time in July 14, 1999. The Army argues then, that any age-based discriminatory activity that occurred beyond 45 days prior to that date, or prior to May 30, 1999, should be barred.

Moody argues that *National Railroad Corp. v. Morgan*, - U.S. -, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), saves her complaint from dismissal for failure to exhaust administrative remedies. In *Morgan*, the plaintiff filed a discrimination and retaliation claim against Amtrak with the EEOC. He alleged that he had been subject to discrete discriminatory and retaliatory acts and had experienced a racially hostile work environment. Under Title VII of the Civil Rights Act of 1964, a plaintiff shall file an employment discrimination charge with the EEOC either 180 or 300 days after an alleged unlawful employment practice has occurred. While some of the discriminatory acts occurred within 300 days of the plaintiff's EEOC filing, many took place prior to that time. The United States Supreme Court held that a Title VII plaintiff making claims of discrete discriminatory or retaliatory acts must file his charge within the appropriate 180 or 300 day period, but a charge alleging hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period.

In the instant case, Moody elected to file her complaint through the administrative process. Under the avenue of relief, she was required to contact the EEO office within 45 days of the alleged discriminatory act. Although Moody visited the EEO office in 1995 and 1997, the only formal

complaint was filed on July 14, 1999. The Army contends that, during her 1995 and 1997 visits, Moody did not put the EEO office on notice that she had a situation that she wanted to resolve through EEO channels. *Jensen v. Frank*, 912 F.2d 517, 520 (1st Cir. 1990) (An employee must allege facts that the counselor should have reasonably concluded that the employee was seeking to resolve, through EEO channels, an allegation of discrimination). The plaintiff offered no competent summary judgment evidence that she put the EEO office on notice in 1995 or 1997.

The court finds that *Morgan*, as applied to the facts of this case, requires that some alleged act of discrimination must have occurred within the 45 day period of time prior to Moody filing the EEO complaint. All of the allegations contained in Moody's complaint and in the memorandum submitted to the EEO office appear to have occurred prior to May 30, 1999. Ellis's alleged age-related comments occurred on August 14, 1997, August 26, 1998, August 31, 1998 and September 17, 1998.[12] These age related claims are clearly untimely.

Moody also alleges that Ellis promised to promote her in February 1995, but then changed her job description and did not promote her. This claim is also untimely. Although Moody alleges that she has repeatedly been denied promotions, she does not allege when these incidents occurred.

The burden is upon Moody to establish waiver, estoppel, equitable tolling to circumvent the forty-five day requirement. Because Moody has not me this burden and has not alleged that she applied for, and was denied a promotion or otherwise suffered an adverse action after May 30, 1999, this court has no jurisdiction.

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[12] See diary of complaints to the EEO office. Govt Exh. C.

Bypassing the Administrative Process

Although the ADEA provides a statute of limitations for claims against private employers, 29 U.S.C. § 626(e)(1) (two years or, for willful violations, three years), there is no express limitations provision in section 633a (i.e., applicable to federal employees). The Act allows a federal employee to choose relief prior to a civil action or proceed directly to court. If a complainant chooses to sidestep the administrative process, the ADEA provides a limitations period. 29 U.S.C. § 633a(d). "In lieu of pursuing administrative relief, the employee may proceed directly to federal district court ... no later than 180 days from the alleged discriminatory act, and providing that he or she first has filed a notice of intent to sue within 30 days prior to commencing suit."[13]

With respect to the instant complaint pursuant to the ADEA, Moody gave notice of her intent to file suit on October 25, 2000. Anything that occurred before April 29, 2000 therefore falls outside of the 180-day window and is untimely.

B. Remaining Claims

The ADEA is the exclusive remedy for a federal employee complaining of age discrimination.[14] Accordingly, Moody's claims pursuant to Louisiana State law will be dismissed.

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[13] *Castro v. United States*, 775 F.2d 399, 403 (1st Cir. 1985) (citing, 29 U.S.C. § 633a(d)).

[14] *Paterson v. Weinberger,* 644 F.2d 521, 525 (5th Cir. 1981).

Moody's claims of discrimination are governed by the tripartite burden- shifting test established by *McDonnell Douglas v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under this test, if Moody establishes a prima facie case of discrimination, the burden shifts to the Army to articulate a legitimate, non-discriminatory reason for reassigning Moody. See *id.* If the Army satisfies this burden, the burden shifts back to the plaintiff, who must prove that "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.s. 133, 120 S.Ct. 2097, 2104-05, 147 L.Ed.2d 105 (2000).

Moody must establish a prima facie case of discrimination by showing that (1) she suffered an adverse job action; (2) she was qualified for the position he occupied; (3) she was within the protected class at the time of the demotion; and (4) she was replaced by someone not within the protected class. See *Bennett v. Total Minatome Corp.*, 138 F.3d 1053, 1060 (5th Cir. 1998); see also *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 n. 3 (5th Cir. 1996) (en banc) (noting that the same analytical framework is applied to Title VII and ADEA discrimination cases). The Army in this case argues that Moody did not suffer an "adverse employment action" and therefore cannot establish a prima facie case of discrimination.

The plaintiff argues that compensation is an ultimate employment decision. Under the ADEA it is unlawful to "discharge any individual or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1)(1999).

Moody alleges that she is the lowest ranking employee at Fort Polk in the Department of Public Works in the Engineering Plans and Services Division. Moody alleges that she was "doing the work of higher grade employees." But, Moody cannot establish a prima facie case of discrimination. She has not demonstrated that she suffered an adverse job action. The fact that she was the lowest ranking employee does not constitute discrimination. He unsupported and conclusory statement that she believed that she was doing the work of higher ranking employees does not create a genuine issue of material fact. Additionally, the plaintiff has introduced no evidence whatsoever that any action taken by the Army was based upon Moody's age. Although Moody was purportedly qualified for the position she occupied and she was within the protected class at the time of her termination, there has also been no evidence introduced by the plaintiff that she was replaced by someone not within the protected class.

Additionally, the ADEA does not entitled a federal employee to a jury trial.[15] Nor are claims for compensatory damages, liquidated damages or "special and general damages" authorized by the ADEA.[16] Accordingly, these claims will be dismissed.

Moody also alleged that she had "to do surveys, boundaries, encroachments, estimates of new buildings, and duties which are not included in her job description. She further alleges that she was denied a promotion by Ellis Smith and that he gave the promotion to one of his friends. These allegations, absent evidence that they were motivated by age, do not violate the ADEA.

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[15] *Lehman v. Nakshian*, 453 U.S. 156, 165, 101 S. Ct. 2698, 69 L.Ed.2d 548 (1981).

[16] *Smith v. Office of Personnel Management*, 778 F.2d 258, 262 (5th Cir. 1985), *cert. denied*, 476 U.S. 1105 (1986).

Conclusion

This court does not have jurisdiction over this action and it will be dismissed.

Lake Charles, Louisiana, this 17th day of September, 2002.

/s/
JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE

STATUTES:

29 U.S.C. § 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act [29 U.S.C. §§621 et seq.;] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 623. Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer-

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

(b) Employment agency practices. It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices. It shall be unlawful for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation. It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc. It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; seniority system; employee benefit plans; discharge or discipline for good cause. It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a

bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section--

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 12(a) [29 USCS § 631(a)] because of the age of such individual;
or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this Act.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the

involuntary retirement of any individual specified by section 12(a) [29 USCS § 631(a)], because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this Act; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) [Deleted]

(h) Foreign practices.

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account;

distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees.

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits--

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years or participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to

such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 206(a)(3) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1056(a)(3)] and section 401(a)(14)(C) of the Internal Revenue Code of 1986 [26 USCS § 401(a)(14)(C)], and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 203(a)(3)(B) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1053(a)(3)(B)] or section 411(a)(3)(B) of the Internal Revenue Code of 1986 [26 USCS § 411(a)(3)(B)], then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of the Internal Revenue Code of 1986 [26 USCS § 414(q)]) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of the Internal Revenue Code of 1986 [26 USCS §§ 401 et seq.].

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m).[.]

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(h) of the Internal Revenue Code of 1986 [26 USCS § 411(b)(1)(H)(v)] and subparagraphs (C) and (D) of section 411(b)(2) of such Code shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 3(24)(B) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1002(24)(B)] and section 411(a)(8)(B) of the Internal Revenue Code of 1986 [26 USCS § 411(a)(8)(B)].

(9) For purposes of this subsection—

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002).

(B) The term "compensation" has the meaning provided by section 414(s) of the Internal Revenue Code of 1986 [26 USCS § 414(s)].

(j) Employment as firefighter or law enforcement officer. It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained—

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B) (i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after the date of enactment of the Age Discrimination in Employment Amendments of 1996 [enacted Sept. 30, 1996]; or

(ii) if applicable State or local law was enacted after the

date of enactment of the Age Discrimination in Employment Amendments of 1996 [enacted Sept. 30, 1996] and the individual was discharged, the higher of—

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this Act.

(k) Seniority system or employee benefit plan; compliance. A seniority system or employee benefit plan shall comply with this Act regardless of the date of adoption of such system or plan.

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deduction from severance pay; reduction of long-term disability benefits. Notwithstanding clause (i) or (ii) of subsection (f)(2)(B)—

(1) It shall not be a violation of subsection (a), (b), (c), or (e) solely because—

(A) an employee pension benefit plan (as defined in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2))) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 3(35) of such Act [29 USCS § 1002(35)] provides for—

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2) (A) It shall not be a violation of subsection (a), (b), (c), or (e) solely because following a contingent event unrelated to age—

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension;
or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of the Internal Revenue Code of 1986 [26 USCS § 501(c)(17)]) that—

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)—

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E) (i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $ 3,000 per year for benefit years before age 65, and $ 750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $ 48,000 for individuals below age 65, and $ 24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on the date of enactment of this subsection [enacted Oct. 16, 1990], and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after the date of enactment of this subsection [enacted Oct. 16, 1990], based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)--

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans. Notwithstanding subsection (f)(2)(B), it shall not be a violation of subsection (a), (b), (c), or (e) solely because a plan of an institution of higher education (as defined in section 101 of the Higher Education Act of 1965 [20 USCS § 1001]) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if—

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this Act;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.

29 U.S.C. § 631. Age limits

(a) Individuals at least 40 years of age. The prohibitions in this Act shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government. In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 15 of this Act [29 USCS § 633a], the prohibitions established in section 15 of this Act [29 USCS § 633a] shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers.

(1) Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $ 44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Secretary, after consultation with the Secretary of the Treasury, so that the

benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

29 U.S.C. § 633. Federal-State relationship

(a) Federal action superseding State action. Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings. In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act [29 USCS § 626] before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.